

THE PERILS OF WRITING AN INTELLECTUAL HISTORY OF TORTS

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TORT LAW IN AMERICA: AN INTELLECTUAL HISTORY. By *G. Edward White*. Oxford: Oxford University Press. 1980. Pp. xvi, 283. \$19.95.

I

Professor White's book may be approached on a number of different levels. At some levels I found in it much to admire; at other levels the book was a great disappointment.

White's basic theme is how academic and judicial thinking about torts has affected the development of tort law. A subsidiary theme is the relationship between academics and judges in the evolution of tort doctrine. The first two chapters, *The Intellectual Origins of Torts in America*¹ and *The Impact of Legal Science on Tort Law, 1880-1910*,² both previously published separately in law journals, are among the book's best portions. They recount how torts developed as a discrete legal subject matter and how tort law, particularly the ascendance of negligence as the principal basis of liability, was affected by the great conceptualist scholars of the late nineteenth and early twentieth centuries. While I might quibble with some points, these chapters testify to White's skills as a historian.

After laying this groundwork, White proceeds to examine the "impact of realism on tort law," and, in succeeding chapters, to discuss the contributions of Cardozo, Prosser, and Traynor to the development of tort law. The final chapter, *The 1970's: Neoconceptualism and the Future of Tort Law*, is divided into two parts. The first is a critique of contemporary scholars like Richard Posner and Guido Calabresi, who have stressed an economic analysis of tort law, and of

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1. Taken, with minor changes, from an article with the same name first published in 86 *YALE L.J.* 671 (1977). It was subsequently reprinted in *G. WHITE, PATTERNS OF AMERICAN LEGAL THOUGHT* 163 (1978).

2. Taken from an article with the same name first published in 78 *COLUM. L. REV.* 213 (1978).

scholars like George Fletcher and Richard Epstein, whom White categorizes as stressing the importance of corrective justice in tort law. In the second part of this chapter, White sets forth some of his own views. He feels that tort law should not be viewed primarily as a compensation scheme, for there are more efficient means of providing compensation for injured people. Rather, White believes that much of the contemporary significance of tort law must be found in its capacity "to sanction or to censure undesirable civil conduct" (pp. 237-38), what White characterizes as the "admonitory function" (pp. 237-38). But White does not present any all-encompassing theory of tort law. Indeed, he opposes any attempt to establish such theories, because he believes that universalizing inevitably distorts the historical richness of tort law and limits the capacity of the law to respond to the complexities of modern life. White also opposes such grand conceptualizing because it leads to the "undue prominence" (p. 243) of academics as law-makers. He notes that however immunized from political accountability judges may be, academics are even less politically responsible (pp. 241-43).

II

I noted at the outset that White's book may be approached at a number of different levels. On the broadest level, I agree with some of White's general conclusions: that the law of torts cannot be organized around a single all-embracing theory; that tort law serves a significant admonitory function as evidenced by the importance of dignitary torts; and that, ideally, law professors ought not to be law-makers. But even at this broad level, White states other general conclusions that I doubt anyone can evaluate. For example, White makes the grand assertion that "[f]ault and tort law became linked at a certain time in American history for reasons that had little to do with morality" (p. 231); White explains the growth of negligence theory as the product of "pressure for some theoretical superstructure for tort law" (p. 231) and of "the congeniality of negligence with . . . late nineteenth-century preferences for letting losses lie where they fell" (p. 231). But I do not see that White's merely noting the possible existence of such nonmoral factors establishes his assertion that the reasons for the rise of negligence had "*little* to do with morality" (p. 231) (emphasis added). I furthermore find it difficult to comprehend White's subsequent assertion that "[t]he fact that the theory that was developed happened to be negligence was fortuitous" (p. 231).

I have already indicated my agreement with White's value judg-

ment that torts should have an important admonitory function. But White makes some much stronger and more questionable claims about the distinction between the admonitory and compensatory features of tort law. He says, for example, "it was not inevitable that tort law should be concerned with compensating victims of civil injuries; compensation has probably not been its original purpose . . ." (p. 232). Again he declares, "[t]he emergence of tort law as a compensation system was thus largely fortuitous" (p. 232). Perhaps to support these claims, White earlier argues that the nineteenth-century acceptance of contributory negligence as a complete defense shows that the main thrust of the nineteenth-century action for negligence was admonitory, not compensatory (pp. 164-65).³ If this is the basis for White's conclusions, I find his reasoning strained. Obviously the existence of the central concept of "fault" shows that the negligence action has an admonitory function. But, even in the nineteenth century, a negligence action had a less admonitory emphasis than most actions for intentional torts. An action for negligence did not lie for nominal damages, and most plaintiffs in negligence actions were not seeking to punish the defendant, but rather to get compensation for their injuries. I would therefore have placed the negligence action among those features of the legal system that were primarily designed to secure compensation for victims. Admittedly, the defense of contributory negligence prevented the fullest possible compensation of accident victims, but this shows only that the notion of compensation was not a neutral one. "Compensation" often means "just compensation," and the latter idea encompasses both a requirement of fault on the part of the person being asked to provide the compensation and, to a lesser extent, a requirement that the victim seeking compensation must be blameless.⁴ To note such qualifications does not establish that the function of a negligence action was ever primarily admonitory.

III

If, when approached at the most general levels, White's book contains some theses that seem correct and others that seem questionable and certainly hard to document, the same sort of restrained

3. See also p. 62.

4. As will be seen, White accepts that the thrust of strict liability for defective products is compensatory. P. 172. And yet, with the advent of comparative negligence, an increasing number of courts are making contributory negligence a partial defense to an action for products liability brought on a strict liability theory. See notes 47-50 *infra*. Thus, the presence of the contributory negligence defense seems an unreliable indicator of admonitory policies.

and mildly favorable reaction cannot be maintained by the critic who examines White's execution at a more particular level: his handling of the nuts and bolts of legal research in his summary of the development of tort law in the twentieth century. Although many of White's errors are admittedly relatively trivial, they are not simply typographical or proof-reading errors (of which the book also has its fair share).⁵

To start at a fairly trivial level: White attempts to give his book an aura of thoroughness and verisimilitude, which might appeal to nonlawyer readers, by his inclusion of much legally extraneous detail. For instance, he often provides the full names of the parties in the cases he discusses; he also gives the exact size of the bean-weighing error (11,854 pounds) in *Glanzer v. Shephard* (p. 132).⁶ This is a harmless annoyance when the details are correct; when they are wrong, however, they are infuriating. White twice asserts that the river into which the decedent in *Hynes v. New York Central Railroad*⁷ dove was the "Hudson River" (p. 121). It was the Harlem River.⁸ The discussion of the *Hynes* case occurs in a chapter devoted to Benjamin Cardozo's work on the New York Court of Appeals. White puts the reader immediately on guard when he begins by asserting that Cardozo "served as associate justice and then chief justice of the New York Court of Appeals" (p. 115). I should have thought that White would have known that Cardozo was Associate *Judge* and later Chief *Judge* of the New York Court of Appeals. And, in the chapter on Justice Traynor, the case of *Richards v. Stanley*⁹ is said to involve "a statute making it a misdemeanor to leave keys in a car parked on a public street" (p. 193). "Confronted," as White writes, with both this statute and with cases in other jurisdictions holding that car owners owed a duty to injured third persons in such situations, "[n]onetheless [Traynor] found that Mrs. Stanley was not liable to Richards. Traynor disposed of the statute by noting that it was not intended to have any bearing on civil actions . . ." (pp. 193-94). In point of fact, the case involved a municipal ordi-

5. One confusing instance appears in chapter 3. White several times refers to Roscoe Pound's article, *Mechanical Jurisprudence*. Pp. 71, 260 nn. 14, 22, 24-27. The reference in the notes is to some variant of "*supra*, note 10." There is no reference to the Pound Article in note 10, nor as nearly as I can tell is the full citation of the article contained anywhere in the book. The Pound article, of course, appeared in 8 COLUM. L. REV. 605 (1908).

6. 233 N.Y. 236, 238, 135 N.E. 275, 275 (1922). In his discussion of the case, White has the buyer hiring the public weigher, whereas in fact the seller did so.

7. 231 N.Y. 229, 131 N.E. 898 (1921).

8. 231 N.Y. at 231, 131 N.E. at 898.

9. 43 Cal. 2d 60, 271 P.2d 23 (1954).

nance (not, as White writes, a state statute). Furthermore, any implication here that Traynor engaged in any judicial creativity is unwarranted when we consider that the ordinance expressly forbade the introduction into evidence in any civil trial of the ordinance itself or any violations of it.¹⁰ Thus, White is perhaps inadvertently misleading when he writes that Traynor "disposed of the statute" (p. 194); in fact Traynor was merely following its very terms.

One reason that White may have brought out the pedant in me is that, presumably for the illumination of lay readers (or to impress them with his arcane erudition), White has the following to say about the holding/dictum distinction:

Judges, for example, had an obligation to give reasons supporting the results they reached, but their reasons functioned on different levels. Some reasons justified the narrow holding; other reasons generalized the results in a limited fashion (dicta); still others were added as emotional weight and their generalized significance was uncertain (obiter dicta) [P. 144.]¹¹

This distinction between dictum and obiter dictum is not, I submit, one that is generally accepted by lawyers.¹² I certainly was not familiar with it. Neither *Black's Law Dictionary* nor *Jowett's Dictionary of English Law* recognizes any such distinction. Indeed, both *Black's Law Dictionary*¹³ and *Jowett's Dictionary of English Law*¹⁴ expressly state that dictum is an abbreviation for obiter dictum.

Other instances of White's mishandling of the nuts and bolts of legal research are of more substantive import. For example, White describes Prosser's role in achieving recognition of the tort of intentional infliction of emotional suffering. He notes that Prosser "had collected 'mental disturbance' cases in a 1939 article, announced the birth of a 'new tort,' and proposed an 'extreme and outrageous' standard of liability. By 1948 the 'extreme and outrageous' standard had been adopted by the Restatement of Torts . . ." (p. 161). White cites for support section 46 of the 1948 Supplement to the *Restatement*.¹⁵ In point of fact the wording "extreme and outrageous" did not ap-

10. 43 Cal. 2d at 61-62, 271 P.2d at 24.

11. The context in which the discussion of the holding/dictum distinction appears is in the review of "scholarly efforts from the 1940s through the 1960s," which White sees "as attempts to integrate generality and particularity in law through a precise analysis of the level at which a given decision was intending to communicate." Pp. 143-44. "Such an analysis," according to White, "required a *sophisticated* awareness of the nature of rationality in law . . ." P. 144 (emphasis supplied).

12. The only reference in print to the distinction that could be found after appreciable effort appears in W. REYNOLDS, *JUDICIAL PROCESS IN A NUTSHELL* 85 (1980).

13. BLACK'S LAW DICTIONARY 409 (5th ed. 1979).

14. THE DICTIONARY OF ENGLISH LAW 628 (gen. ed. The Earl Jowett 1959).

15. P. 161 n.69; footnote appears at p. 271.

pear in section 46 until 1964, with the appearance of the *Restatement (Second) of Torts*.¹⁶ In 1948, section 46 was drafted in terms of the liability of one who "intentionally causes severe emotional distress to another."¹⁷ This was a considerably broader standard of liability that, if it had been retained, might have been challenged as an infringement of constitutionally protected freedom of speech. Furthermore, the sources which White appears to cite for the statement that Prosser proposed the "extreme and outrageous standard" before 1948 provide no support. I say "appears to cite," because one of the footnote references is to *Palsgraf Revisited*, an article that has nothing to do with the subject and moreover did not appear until 1953, well after the 1948 revision of the *Restatement*.¹⁸ White is apparently referring to the article Prosser wrote in 1939, which White cites, and to the 1941 first edition of Prosser's treatise¹⁹ in which Prosser repeated the arguments of his 1939 article. Neither in the source cited nor in any source seemingly cited does the phrase "extreme and outrageous," as nearly as I can tell, appear. The closest approach to that phraseology in Prosser's work before 1948 is "the intentional infliction of extreme mental suffering by outrageous conduct," in the 1939 article, at a page not specifically cited by White, seemingly or otherwise.²⁰ Prosser did not use the precise phrase "extreme and outrageous conduct" until 1964, in the third edition of his treatise.²¹

Discussing Prosser's contributions to the doctrine of last clear chance, White writes that Prosser,

16. 1 RESTATEMENT (SECOND) OF TORTS § 46 (1964).

17. RESTATEMENT OF TORTS § 46 (Supp. 1948).

18. The sentence in the text is: "In his treatment of intentional infliction of emotional distress, for example, Prosser stated that 'somewhere around 1930 it began to be recognized that the intentional infliction of mental disturbance by extreme and outrageous conduct constituted a cause of action in itself.'" P. 161. White's footnote 67, p. 271, is "*Ibid.* at 56." Note 66 is also "*Ibid.*" Note 65 is "Prosser, 'Palsgraf Revisited,' *supra* note 52, at 32." In point of fact, the statement quoted is from W. PROSSER, HANDBOOK OF THE LAW OF TORTS 56 (4th ed. 1971). The statement does *not* appear in the 1941 edition of Prosser's treatise, which is the only one relevant to White's discussion.

19. W. PROSSER, HANDBOOK OF THE LAW OF TORTS 54-67 (1941).

20. Prosser, *Intentional Infliction of Mental Suffering: A New Tort*, 37 MICH. L. REV. 874, 892 (1939). Other phrases used are "intentional, outrageous infliction of mental suffering in an extreme form" (*id.* at 874); "outrageous conduct, of a kind especially calculated to cause serious mental and emotional disturbance" (*id.* at 879); "oppressive and outrageous conduct . . . under circumstances peculiarly calculated to cause mental distress" (*id.* at 881); "outrageous insults" (*id.* at 882); "outrageously insulting collection letters or verbal abuse" (*id.* at 885); and "[w]ith the exception of a recent Texas case . . . no case . . . has been found where the defendant's conduct was anything but flagrant and outrageous" (*id.* at 888). In the 1941 version of Prosser's treatise, *supra* note 19, as nearly as I can tell, the phrases are "acts of an especially flagrant character" (*id.* at 54); "outrageous insults" (*id.* at 59-60); and "conduct exceeding all bounds usually tolerated by society" (*id.* at 65).

21. W. PROSSER, TORTS 49 (3d ed. 1964).

[h]aving exposed the fictional, inconsistent, and arbitrary nature of last clear chance . . . announced that, after all, the "situations" in which last clear chance tended to arise "may be classified." His classification distinguished between three types of "last clear chance" cases: "helpless plaintiff" cases, "inattentive plaintiff" cases, and cases where the defendant's "antecedent negligence" prevented him from avoiding injury to the plaintiff even though he had exercised the "last clear chance" to prevent the accident. [P. 159.]

White implies here that this tripartite classification originated with Prosser. But such is not the case. In fact the classification is the same one adopted in 1934 by the *Restatement of Torts*, seven years before the publication of the first edition of Prosser's treatise.²² Prosser himself never made the claim that White does for the originality of his analysis.

This dreary review of what is, to say the least, an unlawyerlike treatment of sources, continues. White, again in describing Prosser's work, synthesizes the "landmark" case of *Goldberg v. Kollsman Instrument Corp.*,²³ as "allowing a beneficiary of a person killed in an airplane crash to proceed against the manufacturer of the defective altimeter that caused the accident . . ." (p. 170).²⁴ This statement seems to be asserting that the *Goldberg* case allowed an action, in strict products liability, against the maker of a component part. In point of fact the case did no such thing. Rather, the New York Court of Appeals specifically held that an action in strict liability lay only against the manufacturer of the finished product, in this case the airplane manufacturer.²⁵

The cumulative effect of all these errors is to make one extremely skeptical about those of White's more general legal assertions that

22. RESTATEMENT OF TORTS §§ 479-80 (1934). Section 479 deals with helpless plaintiffs and § 480 with inattentive ones. Both sections limit liability to negligence in the failure to utilize with reasonable care the defendant's "then existing ability to avoid harming the plaintiff." *Id.* §§ 479(c), 480(c). See W. PROSSER, HANDBOOK OF THE LAW OF TORTS 408-16 (1941).

23. 12 N.Y.2d 432, 191 N.E.2d 81, 240 N.Y.S.2d 592 (1963).

24. White identifies two other "landmarks" in the extension of strict liability: *Greenman v. Yuba Power Prods., Inc.*, 59 Cal. 2d 57, 27 Cal. Rptr. 697, 377 P.2d 897 (1963); *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 161 A.2d 69 (1960). P. 170.

25. 12 N.Y.2d at 437, 191 N.E.2d at 83, 240 N.Y.S.2d at 595. White's egregious error is all the more remarkable since it occurs in connection with his discussion of Prosser, *The Fall of the Citadel (Strict Liability to the Consumer)*, 50 MINN. L. REV. 791 (1966). Prosser specifically noted what he considered the *Goldberg* case's odd conclusion in that article. *Id.* at 841 & n.124. In discussing another products liability case, *Escola v. Coca Cola Bottling Co.*, 24 Cal. 2d 453, 150 P.2d 436 (1944), White discusses the case as if the asserted negligence of the bottler was its failure to check the adequacy of new bottles already tested by the glass manufacturer. P. 198. In point of fact, the majority in *Escola* was focusing on the fact that the bottler reused bottles—a point White does not mention. The majority was prepared to assert that, if adequate tests of used bottles could not be devised, they should not be reused. 24 Cal. 2d at 460-61, 150 P.2d at 440.

are either unsupported or only insufficiently supported by citations. An instance of the latter occurs in White's extended discussion of Cardozo's opinion in *McFarlane v. City of Niagara Falls*.²⁶ White treats the opinion as a landmark which reoriented the law of nuisance (pp. 127-29). In *McFarlane*, Cardozo held that a woman who brought an action for injuries sustained from falling on an improperly constructed sidewalk could be barred by contributory negligence even if the action were brought in nuisance, so long as the alleged nuisance resulted from defendant's negligent conduct. According to White, "[t]raditionally in New York the commission of a nuisance, whether public or private, had been treated as an 'act-at-peril' tort: the person committing the nuisance was liable to others even if he had taken all available precautions and even if the injured person should have foreseen the risks of injury" (p. 128).²⁷ Later in his discussion, however, White betrays doubt about such an unequivocal interpretation of the pre-*McFarlane* case law: "[e]arlier cases had intimated that contributory negligence *might* not be a defense to an action based on nuisance" (p. 128).²⁸ Of the four cases cited by White in the course of his discussion, one involved the intentional burning of soft coal²⁹ and quoted earlier authority that an injunction could be granted even if the defendant's operations preceded the plaintiff's purchase of his house,³⁰ although in the instant case the plaintiff had purchased his property several years before the defendant erected its factory.³¹ Another of the cases cited by White involved a plaintiff-night watchman who was bitten by the defendant-employer's "ferocious dog"³² "of immense size, and a brute as savage as a tiger or a lion"³³ that was allowed to run loose on the defendant's factory grounds.³⁴ The two remaining cases that White cites did involve actions for injuries caused by improperly con-

26. 247 N.Y. 340, 160 N.E. 391 (1928).

27. (Footnotes omitted) (citing *McCarty v. Natural Carbonic Gas Co.*, 189 N.Y. 40, 81 N.E. 549 (1907); *Muller v. McKesson*, 73 N.Y. 195 (1878)).

28. (Emphasis added) (citing *Clifford v. Dam*, 81 N.Y. 53 [*sic*] (1880); *McGuire v. Spence*, 91 N.Y. 302 [*sic*] (1883)). The proper page citation for *Clifford* is 52; that for *McGuire* 303.

29. *McCarty v. Natural Carbonic Gas Co.*, 189 N.Y. 40, 81 N.E. 549 (1907), cited by White. P. 267 n.31.

30. 189 N.Y. at 47, 81 N.E. at 550.

31. 189 N.Y. at 45, 81 N.E. at 550.

32. *Muller v. McKesson*, 73 N.Y. 195, 198 (1878), cited by White. P. 267 n. 32.

33. 73 N.Y. at 205.

34. Since *Muller* invoked the traditional strict liability of the owners of dangerous animals, it seems inconclusive on the point pursued by White.

structed sidewalks³⁵ but at least one of these cases suggests that contributory negligence might be a defense in some such cases.³⁶ Thus the cited cases simply do not support the conclusion that Cardozo, in *McFarlane*, made any remarkably creative use of precedent. I dwell upon the matter because White contends that "Cardozo made the result in *McFarlane* seem so inexorable and sensible that one might overlook the fact that his opinion sought virtually to eliminate nuisance as a separate category of tort actions" (p. 128). It seems unlikely that Cardozo sought to do any such thing. It is at least as plausible that the existing precedents seemed so clear to him that he did not think that he was making a major change in the law.³⁷

I have even more difficulty with White's theorizing about Cardozo's opinion in *Ultramares Corp. v. Touche*.³⁸ According to White,

[t]he pronouncement was that while the negligent misrepresentations of accountants did not subject them to liability to third persons in negligence, those misrepresentations if "gross" enough could subject them to liability to third persons in fraud. This last pronouncement was not only unsupported but represented a departure from prior case law, which had limited liability for unintentional or reckless misrepresentations to persons who were parties to the original transaction. [P. 135.]

No citations are given to this "prior case law." Given White's casual treatment of authority, one is hesitant to accept the statement on faith. In fact, in *Derry v. Peek*,³⁹ decided more than forty years before *Ultramares*, the House of Lords had indicated that a fraud

35. *McGuire v. Spence*, 91 N.Y. 303 (1883); *Clifford v. Dam*, 81 N.Y. 52 (1880), cited by White. P. 267 n.33.

36. The *McGuire* case most strongly indicates the availability of the defense. In *Clifford* the court suggested that if the sidewalk had been constructed under the authority of a permit, the defense might lie. Prosser cites the *Clifford* case as standing for the proposition that courts have ruled that contributory negligence is not a defense to an action based on nuisance. W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* 609 & n.23 (4th ed. 1971). But this statement, if true, was only strictly true under the *Clifford* case of sidewalks constructed without an authorizing permit. Thus in *McFarlane*, counsel for the defendant City of Niagara Falls seems to have correctly understood the thrust of *Clifford* when he argued that the sidewalk in question "was authorized . . . [the City] did not construct it without or against statutory authority." *McFarlane v. City of Niagara Falls*, 247 N.Y. 340, 341 (1928).

37. One might note that it seems to be accepted as commonplace in English law that contributory negligence has long been a defense to an action based upon nuisance, particularly in highway obstruction cases. See *Dymond v. Pearce*, [1972] 1 Q.B. 496 (C.A.); cf. *Farrell v. John Mowlem & Co.*, [1954] 1 Lloyd's List L.R. 437. There are no cases questioning that assumption. It also has been pointed out that "*Butterfield v. Forrester*, (1809) 11 East 60, seems to have been a case of nuisance although always regarded as a leading case on contributory negligence." J. SALMOND, *TORTS* 59 n. 93 (17th ed. R. Heuston 1977). This statement is made in connection with the statement in the text that one can assume that contributory negligence is a defense in all cases of nuisance.

38. 255 N.Y. 170, 174 N.E. 441 (1931).

39. 14 App. Cas. 337 (1889).

action could be brought against persons not in privity with the injured party on grounds of recklessness as to truth or falsity.⁴⁰

The unease created by White's sloppiness leads one to question statements like this: "[t]he railroad" in *Palsgraf v. Long Island Railroad* "had liability insurance . . ." (p. 99). How does White know this? White gives no citation to the record, and the record of the case in fact contains no such information.⁴¹ My own experience in practice was that, at least as recently as the late 1950s, most railroads were self-insured.

To end this portion of my review on a more substantive note, I wish to turn to White's treatment of the development of strict liability in tort for defective products. White discusses the practical significance of the introduction of strict liability for defective products. White does not see this significance as lying in strict liability's creation of a "vast new class of litigants in defective products cases" (pp. 170-71), since even under a negligence theory *MacPherson v. Buick Motor Co.*⁴² and cases following it "had extended the duty of manufacturers to remote persons injured in a foreseeable fashion" (pp. 170-71). "Nor," owing to the liberal use of *res ipsa loquitur* in negligence cases, "did strict liability help plaintiffs surmount problems of proof" (p. 171). Rather, the major innovation over the negligence system wrought by strict liability was strict liability's permitting the plaintiff more readily "to identify the defendant responsible for his injuries" (p. 171). The importance of the shift to a strict liability, in other words, was that the plaintiff consumers could no longer be defeated by the complexities of the distribution system, since they "could identify manufacturers as prospective defendants" (p. 171). Perhaps it is merely a case of my own obtuseness,⁴³ but it is not easy to see how strict liability helps solve the problem of identification in

40. 14 App. Cas. at 361, 364-64. See also 14 App. Cas. at 379, where Lord Herschell stated, "I cannot hold it proved . . . that [the defendant] knowingly made a false statement, or one which he did not believe to be true, or was careless whether what he stated was true or false" (emphasis added). It should be noted that, contrary to the implications of White, Cardozo did not hold in *Ultramares* that "gross negligence" was the equivalent of fraud but rather, relying on *Derry v. Peek*, that gross negligence could be evidence of fraud. In *Ultramares* the defendants' fraud was their certification of something as true as a result of their own investigation—the correspondence of the balance sheet to their client's accounts—when, as a jury could find, the defendants did not know if there was any such correspondence. In other words they stated that something was true without having "a sure or genuine belief on the subject." See *Ultramares Corp. v. Touche*, 255 N.Y. 170, 189-93, 174 N.E. 441, 446-50 (1931).

41. For the record of the *Palsgraf* case, see A. SCOTT & R. KENT, CASES AND OTHER MATERIALS ON CIVIL PROCEDURE 1061-105 (1967) (reprinting the complete "Case on Appeal" filed in printed form with the court of appeals).

42. 217 N.Y. 382, 111 N.E. 1050 (1916).

43. White may mean to say that strict liability simply created a new cause of action against manufacturers. If so, his difficulties are verbal and not doctrinal.

an action against the manufacturer or against any person prior to the retailer in the distribution scheme. Under section 402A of the *Restatement (Second) of Torts*,⁴⁴ the paradigmatic standard of strict liability for defective products, the plaintiff must show that the product was defective at the time of sale by the particular defendant.⁴⁵ In a negligence case, the plaintiff must show that the negligence occurred before the manufacturer first sold the item. One would have liked to see more argument as to why the negligence and strict liability systems present such markedly different problems of identification.

I also cannot fail to fault White for neglecting to discuss or even mention the effect of the development of comparative negligence on products liability. White does of course discuss the rise of comparative negligence and the decline of contributory negligence as a complete defense to a negligence action (pp. 164-68). Under the doctrines of strict liability for defective products as developed by Prosser and Traynor (whose contributions White discusses at some length (pp. 168-72, 197-207)), one of the advantages to the plaintiff of a strict products liability action over a negligence action is that contributory negligence is not a defense.⁴⁶ The development of strict liability for defective products is clearly one of the important features of what White sees as changing the thrust of tort law from admonition to compensation (p. 172). In a book published in 1980 I would have liked to see White's reaction to the fact that California, since 1978,⁴⁷ Florida, since 1976,⁴⁸ Texas, since 1977,⁴⁹ and now an

44. § 402A. Special Liability of Seller of Product for Physical Harm to User or Consumer

(1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if

(a) the seller is engaged in the business of selling such a product, and

(b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

(2) The rule stated in Subsection (1) applies although

(a) the seller has exercised all possible care in the preparation and sale of his product, and

(b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

RESTATEMENT (SECOND) OF TORTS § 402A (1965).

45. RESTATEMENT (SECOND) OF TORTS § 402A, Comment g (1965):

The rule stated in this Section applies only where the product is, at the time it leaves the seller's hands, in a condition not contemplated by the ultimate consumer which will be unreasonably dangerous to him. The seller is not liable when he delivers the product in a safe condition, and subsequent mishandling or other causes make it harmful by the time it is consumed. . . .

46. See RESTATEMENT (SECOND) OF TORTS § 402A, Comment n (1965).

47. See *Daly v. General Motors Corp.*, 20 Cal. 3d 725, 575 P.2d 1162, 144 Cal. Rptr. 380 (1978).

48. See *West v. Caterpillar Tractor Co.*, 336 So. 2d 80 (Fla. 1976).

49. See *General Motors Corp. v. Hopkins*, 548 S.W.2d 344 (Tex. 1977).

increasing number of other jurisdictions⁵⁰ have held that contributory negligence in the form of comparative negligence, is a defense to an action based upon strict liability for defective products.

IV

I should now like to turn to what I consider a major conceptual defect in White's attempt to write an intellectual history of the law of torts.

White spends a great deal of time discussing the influence of certain "legal realists," especially the late Leon Green, who contended that there are no generalized duties owed by all to all, but only duties owed by some particular persons to other particular persons (pp. 82-83, 94-96, 107-08, 125-27). According to Green, the crucial issues in the trial of an action for negligence are the issues of duty and breach of duty. The issue of causation, by contrast, concerns only the limited initial question of whether a "causal connection" existed between the defendant's conduct and the plaintiff's injury. On the issues of duty and breach of duty, it is for the judge to decide as a matter of public policy whether the defendant owed the plaintiff a duty. Foreseeability of harm or risk is an important component of this inquiry, but it is not the only one. If the judge finds the existence of a duty and if there is a causal relation between the defendant's conduct and the plaintiff's harm, the jury must then make the crucial decision whether the particular defendant has been negligent to the particular plaintiff. The jury in deciding the negligence issue will consider many of the factors already considered by the judge in determining the existence of a duty, but it will consider them only in relation to the parties to the litigation, and not as a matter of broad social policy. It is the jury's function to find whether "*under all the circumstances* (including this multitude of cause factors) the defendant's conduct was negligent and whether he should be penalized for his conduct or whether plaintiff should have to bear his loss without compensation."⁵¹ White maintains, undoubtedly correctly, that

50. See *Steuve v. American Honda Motors Co.*, 457 F. Supp. 740 (D. Kan. 1978); *Kennedy v. City of Sawyer*, 618 P.2d 788 (Kan. 1980); *Busch v. Busch Constr. Inc.*, 262 N.W.2d 377 (Minn. 1977). See also N.Y. CIV. PRAC. § 1411 (McKinney 1976), enacted in 1975, which provides for comparative negligence in "any action . . . for personal injury, injury to property, or wrongful death" (emphasis added).

51. Green, *The Causal Relation Issue in Negligence Law*, 60 MICH. L. REV. 543, 571-72 (1962) (emphasis in original). See Green, *The Duty Problem in Negligence Cases*, 28 COLUM. L. REV. 1014 (1928); Green, *The Duty Problem in Negligence Cases: II*, 29 COLUM. L. REV. 255 (1929); Green, *Foreseeability in Negligence Law*, 61 COLUM. L. REV. 1401 (1961). Green had earlier sketched out his ideas, in textbook form, in L. GREEN, *RATIONALE OF PROXIMATE CAUSE* (1927).

Green's views strongly influenced Cardozo in the *Palsgraf* case (pp. 96-100). Since *Palsgraf*, according to White, many of the crucial issues of negligence theory have been removed from the jury's proximate cause inquiry and subsumed under the court's decision of the duty issue (p. 184). The result, White says, is that the relational notion of negligence, the notion that duties are owed to particular persons and not to the world at large, has become paramount.⁵² White furthermore, as already noted, sees a decline in the importance of negligence as the ambit of strict liability expands and law becomes more and more a compensation system.

To some of these conclusions I must respectfully dissent. It is of course true that the scope of strict liability has expanded. But so has the reach of negligence. As White himself recognizes, areas such as negligent infliction of emotional distress and injuries caused by owners and occupiers of land are ceasing to have their own special doctrines and are being absorbed by general negligence theory.⁵³ Such a development is surely not the result of any multiplication of particularized duties; on the contrary, I would assert that the past thirty years have witnessed the emergence of a single general duty: one normally has a duty to avoid injuring all those whom one has subjected to a foreseeable risk of (physical) injury. If the foreseeability of injury is slight then the reasonableness of one's conduct may become important. Far from relegating proximate cause to the ash heap of history, this general duty, since it focuses on the foreseeability of injury, makes the considerations underlying proximate cause dispositive in hard tort cases. If tort duties were completely particularized, depending on the unique features of particular plaintiffs in relation to particular defendants, all torts law would be *ex post facto*. It would have no predictive features. Leon Green declared that he accepted the complete *ex post facto* character of negligence,⁵⁴ but even he accepted limited generalizations about classes of cases. For example, he generalized about "railroad cases"⁵⁵ even though such

52. See pp. 107, 184.

53. White discusses the extension of general negligence theory to the liability of landowners at pp. 190-93. The extension of general negligence theory to the negligent infliction of mental distress is generally taken as having received tremendous impetus from *Dillon v. Legg*, 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968). More recent cases include *Dziokonski v. Babineau*, 380 N.E.2d 1295 (Mass. 1978); *Portee v. Jaffee*, 84 N.J. 88, 417 A.2d 521 (1980).

54. See Green, *Tort Law Public Law in Disguise*, 38 TEXAS L. REV. 257, 269 (1960). See also Green, *The Duty Problem in Negligence Cases*, 28 COLUM. L. REV. 1014, 1025 (1928).

55. See Green, *The Duty Problem in Negligence Cases: II*, 29 COLUM. L. REV. 255, 275 (1929). In the same article he also discussed, *inter alia*, automobile cases, *id.* at 277. See also Green, *Duties, Risks, Causation Doctrines*, 41 TEXAS L. REV. 42 (1962), where, *inter alia*, Green grouped "car key cases," *id.* at 63, and "bad brakes-darting out cases," *id.* at 68.

generalization was contrary to his theory of the particularity of each case. Some railroads are more solvent than others and some are more essential for the communities they serve than others; generalizations like "railroad cases" smooth over differences that Green, had he been perfectly consistent, would have treated as important. At any rate, most observers have resiled from the implications of Green's theories, and I would submit that the recent history of negligence shows a move toward a more generalized theory of negligence.

Why has tort law moved away from the complete instantiation of each case? First, administrative difficulties make it impossible to try all cases and so we must adopt rules that encourage pre-trial settlement of disputes. Without general criteria of liability to serve as the basis for settlement, parties would rarely settle. Secondly, I would maintain, public notions of justice also require a level of generality that would be impossible if each discrete feature of a case became a factor to be weighed on the scales of justice.

I would assert, however, that the main reason for the collapse of the particularized justice theory of negligence is its failure to provide any adequate decision-making procedure. Of course, in one sense, all decision making involves a balancing of interests. But to maintain that interest balancing is properly the *essence* of most or perhaps all individual judicial decisions is another matter. White seems to approve of the realists' and post-realists' insistence that the decision of each tort case should turn on the balancing of the interests involved in that case.⁵⁶ Although White does present some more general reflections on the intellectual battles between legal realism and its opponents,⁵⁷ a quotation from Prosser — "'most of the writers who have pointed out the process have stopped short of telling us how it is to be done'"⁵⁸ — is about the extent of White's recognition of the formidable practical and epistemological shortcomings of the interest-balancing theory. I therefore fault White for writing an intellectual history, which is not only descriptive but also critical, in which he does not examine the difficulties of a theory that plays such a prominent part in his discussion; this criticism is valid regardless of

56. My conclusion that White "seems to approve" the thrust of realistic thought as to interest balancing is based upon the general tone of his writing and specific statements such as this: "The ambivalence of the *Palsgraf* case came from the failure of either Cardozo's or Andrew's opinions openly to concede that in cases involving liability in negligence for remote consequences, or to remote persons, the process of resolution was explicitly one of interest-balancing." P. 100. His approval of post-realist interest balancing is suggested by his comments upon Prosser's continuation of that approach in the world of torts scholarship. See pp. 157-58.

57. See, e.g., pp. 74-75, 110-13, 139-43.

58. P. 158 (quoting W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* 17 (1941)).

whether White himself approves of the interest-balancing approach. I shall proceed to sketch briefly some of the difficulties of the interest-balancing theory.

An adequate theory of interests must initially confront the problem of defining and identifying "interests." Since White often cites Karl Llewellyn when he wants to describe the tenets of legal realism,⁵⁹ we might examine what Llewellyn, in his heyday as a realist, thought interests were. According to Llewellyn, the "interests" bandied about in common speech were not true interests, but only aphorisms. Expressions like "security of transactions" were merely rubrics, or, to use the phrase Llewellyn adopted, "a red flag to *challenge investigation* in certain general directions."⁶⁰ Interests, he said, were rather "*groupings* of behavior claimed to be significant."⁶¹ When talking about interests it was important to examine "the objective data, the *specific* data, *claimed* to represent an interest."⁶² "What is left, in the realm of *description* are at the one end the facts, the groupings of conduct (and demonstrable expectations) which may be claimed to constitute an interest; and on the other the practices of courts in their effects upon the conduct and expectations of the laymen in question."⁶³ As thus defined, interests are complex entities that are difficult to summarize in a few words and to identify in individual cases.

Next, even if one could come up with relatively concise and yet meaningful statements of the interests involved in a particular case, one would face the further problem of deciding whether the interests identified were really comparable enough to permit balancing them against each other. Roscoe Pound long ago pointed out that one cannot directly weigh social or public interests against individual interests.⁶⁴ That would be like comparing apples and oranges. To weigh individual interests against social interests, the individual interests in, say, security of the person, would have to be translated into the *social* interest in the security of the individual.⁶⁵

59. See, e.g., pp. 71 n.21, 112 n.162, 140 n.5.

60. Llewellyn, *A Realistic Jurisprudence — The Next Step*, 30 COLUM. L. REV. 431, 445 (1930) (emphasis in original).

61. *Id.*

62. *Id.* at 446.

63. *Id.* at 448.

64. Pound, *A Survey of Social Interests*, 57 HARV. L. REV. 1-3 (1943). This article was a revised version of a paper presented to the American Sociological Association in 1921. *Id.* at 1 n.*.

65. *Id.* at 3. The point was well restated, although unfortunately without reference to Pound's contributions, in Fried, *Two Concepts of Interests: Some Reflections on the Supreme Court's Balancing Test*, 76 HARV. L. REV. 755, 763 (1963).

Even assuming that all the necessary translations could be made so that all the interests being considered were in the same universe of discourse, the ultimate problem would remain: how do you *weight* the interests? One may recall Ronald Dworkin's suggestion that the reason that judges do not have broad discretion, even in cases not covered by legal rules, is that there exist certain legal principles that constrain judicial choices.⁶⁶ Dworkin recognized, however, that for his analysis to be plausible there would have to be a way to weight these principles so that, when the principles came into conflict, as they almost always would in difficult cases, the proper decision could be reached.⁶⁷ Dworkin may have intended to develop such a weighting procedure, but it is clear that he now regards the task as impossible. While continuing to maintain that right answers exist, he now believes that the right answer is the one that the judge finds in accord with a coherent set of principles that "justifies . . . in the way that fairness requires" the decision in the instant case in light of the "institutional history" of society's legal structure.⁶⁸ I do not propose to examine the intricacies of Dworkin's claim here. My purpose is merely to underscore the difficulties of achieving a coherent scheme for weighting legal principles.

In sum, the problems of identifying, comparing and weighting interests would present courts with a mind-boggling task. A tort system wholly given over to the theory of particularized justice would be nothing more than Judge Hutchinson's "hunch" system: judges would be forced to decide by their gut feelings after looking at the whole *Gestalt*.⁶⁹ We may let juries decide by hunch, but we place strict controls on their power to do so, and even stricter controls on judges. A judge must justify his decision. Of course the law does not contain precise rules that dictate the result of each case. But when a judge decides in favor of, say, the defendant, he must explain why the case is different from the cases relied upon by the plaintiff in which the plaintiff prevailed, and the differences that the judge

66. See Dworkin, *The Model of Rules*, 35 U. CHI. L. REV. 14 (1967), in which he elaborated on the thesis previously announced in his *Judicial Discretion*, 60 J. PHIL. 624 (1963). The *Model of Rules* is among the essays reprinted in R. DWORKIN, *TAKING RIGHTS SERIOUSLY* at 14 (1977), as *The Model of Rules I*. For the criticism that the illustrations that Dworkin used to support his thesis simply do not support his argument, see Christie, *The Model of Principles*, 1968 DUKE L.J. 649.

67. Dworkin, *The Model of Rules*, *supra* note 66, at 25-27, 35-36 (*TAKING RIGHTS SERIOUSLY*, *supra* note 66, at 24-27, 34-37).

68. See Dworkin, *Hard Cases*, 88 HARV. L. REV. 1057, 1098-99 (1975), reprinted in *TAKING RIGHTS SERIOUSLY*, *supra* note 66, at 81, 120.

69. See Hutcheson, *The Judgment Intuitive: The Function of the "Hunch" in Judicial Decision*, 14 CORNELL L.Q. 274 (1929).

points out must be legally significant ones.⁷⁰ Under a system of particularized justice, such explanations would be all but impossible. Interest balancing without the constraints of the traditional legal requirement of consistency within general categories of cases would turn out in practice to be nothing more than well-intentioned bias masquerading as objective justice.

An example from the *Restatement* illustrates the difficulty with making interest balancing the keystone of judicial decision making in torts. In 1938, section 520 of the *Restatement of Torts* subjected the operator of an "ultrahazardous activity" to strict liability if the activity miscarried, and defined such an activity as one that (a) "necessarily involves a risk of serious harm" to others and (b) "is not a matter of common usage."⁷¹ The common-usage exception was intended to accommodate Lord Cairns's declaration in *Rylands v. Fletcher*⁷² that the liability established in that case was limited to the "non-natural use" of land. One practical implication of the common-usage exception was that automobile driving would not be classed as an "ultrahazardous activity." Other applications of the common-usage exception posed some difficulties. What about fumigation of commercial buildings? It certainly was a common enough activity; indeed in many cities it was required by law. Nevertheless, in *Luthringer v. Moore*,⁷³ the Supreme Court of California, citing for support the *Comments* to section 520,⁷⁴ held that, while fumigation might be a common activity, it was only performed by a very small number of professional fumigators. It was thus not a matter of common usage and, accordingly, could appropriately be classified as an ultrahazardous activity subject to strict liability. In contrast, however, in *Loe v. Lenhardt*,⁷⁵ the Oregon Supreme Court classed crop-dusting as an ultrahazardous activity despite the fact that the court considered it a matter of common usage. The dangerousness of the activity alone was sufficient to justify this classification.

In 1977, Volume III of the *Restatement (Second) of Torts* was published. Although Prosser was by then dead, he had been the Reporter when section 520 and its companion sections were drafted.⁷⁶ Instead of "ultrahazardous activity," the *Restatement (Second)* used

70. See Christie, *Objectivity in the Law*, 78 YALE L.J. 1311, 1333 (1969).

71. RESTATEMENT OF TORTS § 520 (1938).

72. L. R. 3 H. L. 330, 339 (1868).

73. 31 Cal. 2d 489, 190 P.2d 1 (1948).

74. 31 Cal. 2d at 500, 190 P.2d at 8 (citing RESTATEMENT OF TORTS § 520, Comment e).

75. 227 Or. 242, 362 P.2d 312 (1961).

76. RESTATEMENT (SECOND) OF TORTS (Tent. Draft No. 10, 1964).

the term "abnormally dangerous activity." But more to the point, the *Restatement (Second)* openly adopted, instead of the two-pronged test of the *Restatement*, a factor analysis that included interest-balancing. The full text of section 520 of the *Second Restatement* merits quotation:

In determining whether an activity is abnormally dangerous, the following factors are to be considered:

- (a) existence of a high degree of risk of some harm to the person, land or chattels of others;
- (b) likelihood that the harm that results from it will be great;
- (c) inability to eliminate the risk by the exercise of reasonable care;
- (d) extent to which the activity is not a matter of common usage;
- (e) inappropriateness of the activity to the place where it is carried on; and
- (f) extent to which its value to the community is outweighed by its dangerous attributes.⁷⁷

This statement of the test leaves two overriding questions. Who is to make the determination of what is an abnormally dangerous activity, and how is the required factor analysis and interest-balancing to be done? As to the first question, the *Second Restatement's* Comments declare that the judge and not the jury is to decide whether an activity is an abnormally dangerous one.⁷⁸ The Comments concede that in a negligence case a jury might have to make a whole host of subjective determinations in deciding the reasonableness of an activity, but the Comments conclude that the decision whether an activity is abnormally dangerous is of a different type. The principal difference asserted is that, unlike a jury's decision in a negligence case, the classification of an activity as abnormally dangerous could destroy an entire industry. But of course a ruling that a product, say an airliner, is negligently designed could also destroy an industrial enterprise. Moreover, at least in California⁷⁹ and probably in New Jersey,⁸⁰ in actions brought on a theory of strict liability for defective products, the issue of product defect is submitted to the jury. Why should strict liability under an abnormally dangerous activity theory be treated differently from strict liability for a defective product?

The second question raised by section 520 of the *Restatement (Second)*, and the one that most immediately concerns this discus-

77. RESTATEMENT (SECOND) OF TORTS § 520 (1977). This volume of the *Restatement (Second)* was adopted in 1976 and published in 1977.

78. *Id.* at Comment 1.

79. See *Barker v. Lull Engr. Co.*, 20 Cal. 3d 413, 435, 143 Cal. Rptr. 225, 239-40, 573 P.2d 443, 457-58 (1978); 50 CAL. JUR. 3d, *Products Liability*, § 47 (1979).

80. See *Suter v. San Angelo Foundry & Mach. Co.*, 81 N.J. 150, 176-77, 406 A.2d 140, 153 (1979).

sion, is how the six factors listed are to be weighted. The Comments declare that the determination is to be made by the court, "upon consideration of all the factors listed in this Section, and weight given to each that it merits upon the facts in evidence."⁸¹ I submit that this is no weighting method. If taken literally the Comments seem to suggest that each case is *sui generis* and that one need have no fear that an individual decision, whether made by a judge or a jury, might ruin an entire industry. Thus in any case involving an activity not covered foursquare by a precedent, one would have to litigate up to the highest court of the jurisdiction before knowing how the activity would be classified. The value of precedents covering other activities would be minimal. Whether one liked the old test or not, it was certainly easier to administer, since it asked only whether the activity involved "a risk of serious harm" to others that "could not be eliminated by the exercise of the utmost care," and whether the activity was or was not "a matter of common usage."⁸²

It may be objected that the *Restatement (Second)* merely made explicit the factors already considered by the courts. This is not so. Of course, in a close case, whatever the legal issue, factors like the comparative wealth of the parties and the social importance of the activity are likely to be considered and will likely influence the decision. One should not ignore the individual equities in any case. But to recognize that the courts will be *influenced* by individual equities in deciding some legal issue is not the same as saying that these individual equities themselves are the legal issue.

An enormous range of legal decisions could all be plausibly justified under section 520 of the *Restatement (Second)*. For example, it was held in Maryland that a neighborhood gas station, whose leaking storage tanks fouled the well of an adjoining landowner, was an abnormally dangerous activity.⁸³ An Oregon court has, however, disagreed.⁸⁴ In a Florida court it was seriously urged, again on the basis of the new version of section 520, that a mine producing phosphatic wastes was not an abnormally dangerous activity because

81. RESTATEMENT (SECOND) OF TORTS § 520, Comment 1.

82. RESTATEMENT OF TORTS § 520 (1938).

83. *Yommer v. McKenzie*, 255 Md. 220, 257 A.2d 138 (1969). The court specifically held that section 520 of the *Restatement (Second)* considered in draft form had the effect of enlarging the circumstances under which the rule of strict liability will apply. 255 Md. at 223-24, 257 A.2d at 140.

84. *Hudson v. Peavey Oil Co.*, 279 Or. 3, 566 P.2d 175 (1977). The court held that the operation of a gas station was not so exceptional a circumstance nor was the danger from seepage so grave as to warrant classifying the activity as "abnormally dangerous." 279 Or. at 8, 566 P.2d at 178.

of the location of the mine and its social importance.⁸⁵ The court, however, ruled against the defendant because of the size of the activity and the possibility of enormous damage if the activity miscarried.⁸⁶

I leave to others the question of whether section 520 of the *Restatement (Second)* is an improvement. My own opinion is that it is not. I wish to use the example, however, because it (a) involves torts; (b) is clearly an attempt to bring the factor analysis involved in interest balancing into the decisional process in an area where it had hitherto not played so prominent a part; and (c) clearly highlights the difficulties behind interest balancing as a viable decision-making tool. I fault White not because he does not discuss this single example. But White claims that his book is a *critical* history of American tort law and that the realist impulse toward interest balancing was an intellectual development of major importance in that history. Yet he scarcely discusses the intellectual problems that that development presents. For this I fault him.

85. *Cities Serv. Co. v. State*, 312 So. 2d 799, 801-03 (Fla. App. 1975).

86. 312 So. 2d at 803-04.